92-1

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LYNWOOD MOREAU, *et al.*,
Petitioners,

v.

JOHNNY KLEVENHAGEN, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 207(o) of the Fair Labor Standards Act, as amended, defines the circumstances under which a public employer is permitted to deviate from the basic rule that employees required by their employer to work overtime must be paid in cash time and a half. Under Section 207(o), a public employer may provide compensatory time in lieu of overtime pay in cash pursuant to

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), [pursuant to] an agreement or understanding arrived at between the employer and employee before the performance of the work. [29 U.S.C. Section 207(o)(2)(A).]

The question presented here is whether a public employer in a state which does not provide for NLRB-type collective bargaining who refuses to respond to or to work out a compensatory time agreement with a representative designated by its employees for that purpose may nonetheless unilaterally implement and follow a compensatory time program?

PARTIES TO THE PROCEEDING BELOW

I.

PLAINTIFFS APPELLANTS PETITIONERS

Lynwood Moreau individually and as president, Harris County Deputy Sheriff's Union, Local 154 IUPA, AFL-CIO, and as FLSA REPRESENTATIVE of 37 similarly situated consenting Harris County Law Enforcement Officers.

The Harris County Deputy Sheriff's Union, Local 154 IUPA, AFL-CIO, on its own behalf, and as an FLSA representative of the 400 Deputy Sheriffs it represents.

Kenneth O. Adams
Daniel Almendarez
Shirley Ashcraft
Jeron McNeil Barnett, Sr.
Humberto Rios Barrera
M. Barron
Mark D. Baughman
Bradley T. Bennett
Richard M. Blackwell
Alton W. Bowdoin
Bruce Breckenridge
Richard E. Burns
Don E. Bynum
Chuck Calvit
Robert Casey
Richard A. Castillo
John Robert Chaney
Paul Steven Cordova
John F. Costa
Carl Davis, Jr.
John P. Denholm
Dan B. Daiz
Nelda DeLaCruz
Chris E. Dempsey
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Feliz Dlouly, III
Karen Douglas
Donald R. Downey
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Ray A. Dupont
Freddy G. J. Lafuente
J. J. Freeze
Kim L. Fuller
Manuel R. Garza
Thomas E. Goodfellow
Michael Gregory Gonzales
Vincent A. Gonzales
P. R. Halfin, Jr.
James H. Happel
Mona F. Hawk
R. L. Hassel
Neal Hines
James M. Hoffman
Annette M. Horton
Larry D. Howell
Vernon Levone James
Joe Franklin
Jimmie L. Jones

Patrick A. Kaptchinskie
Warren A. Kelly, Jr.
James Paul Kershaw, Jr.
Janet L. King
Margaret L. Knigge
Dennis R. Koch
Cassandra Leach
Brian D. Leighton
Barbara Leitner
Vernon Scott Lemons, Jr.
Ron Lenard
Kenneth V. Liquori
Robert Richard Long
David Lopez
Leonel Martinez
Joe Clinton Mayes
Russell Lee Mayfield
James Kevin McGehee
Eugene T. Merritt, Jr.
Marty M. Mingo
Diane L. Mireles
L.V. Moreau
Joe A. Munoz
John M. Owens
Barnard G. Palmer
Gary Wayne Phillips
Thomas Wayne Phillips
Gregory D. Pinkins
Larry Pohlmeyer
Joshua Todd Porter
Carlos M. Ramirez
Michael Rankin
James W. Redd
James A. Reed
James C. Reynolds, III
Donald L. Robinson
R'Wanda Sampson
Michael Wayne Simpson
James W. Sims
M. J. Smith
Russell Rocamontes
Stephen Wayne Russell
William J. Ryan
Andres Sanchez
Denise A. Schreiber
J. C. Seckler
Lawrence R. Seward
Donald Shaver
James K. Shipley
Michael D. Sieck
James M. Siegel
Effie Louise Skinner
Patrick Spacek
Pamela Stanford
Rickye Stanford
Terry Stolitza
Rachel Tolbert
Dennis J. Tones
Robert Thomas Tonry
Thurman T. Tyndall
Mark A. Walker
Walter L. Walker
Roger D. Wedgeworth
Calvin Gary Wilson
Terry Allen Wooten

II.

DEFENDANTS/APPELLEES/RESPONDENTS

Johnny Klevenhagen, Sheriff of Harris County, Texas.

Judge Jon Lindsay, Harris County Commissioner, Harris County, Texas.

Harris County, Texas.

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PETITION FOR A WRIT OF CERTIORARI

Lynwood Moreau, et al., the plaintiffs in the District Court and the appellants in the Court of Appeals, hereby petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Lynwood Moreau, et al., v. Johnny Klevenhagen, et al.*, 5th Cir. No. 90-2833 (March 31, 1992).

OPINIONS BELOW

The Court of Appeals opinion is reported at 956 F.2d 516 (5th Cir. 1992) and is reproduced as Appendix A (pp. 1a-14a) in the separately bound Appendix to this *certiorari* petition (hereafter "Pet. App.").

The District Court's memorandum and order denying plaintiffs' motion for partial summary judgment and granting defendants motion for summary judgment, dated August 29, 1990, is unreported and is reproduced

as Appendix B (Pet. App. 15a-24a). The District Court's final judgment dated August 29, 1990 is unpublished and is reproduced as Appendix C (Pet. App. 25a).

JURISDICTIONAL STATEMENT

The Court of Appeals' opinion and judgment were entered on March 31, 1992. The Judgment is reproduced as Appendix D (Pet. App. 26a-27a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS

Section 207(o) of the Fair Labor Standards Act, 29 U.S.C. Section 207(o), is reproduced as Appendix E (Pet. App. 28a-29a).

The Secretary of Labor's regulations set out at 29 C.F.R. Section 553.23, are reproduced in Appendix E (Pet. App. 30a-35a).

STATEMENT OF THE CASE

1. The Fair Labor Standards Act (hereafter "FLSA"), as amended, provides that employers must pay their employees one and one half times the employee's normal pay for overtime worked. *See* FLSA Section 7, 29 U.S.C. Section 207. Under certain stated circumstances, Section 207(o) will allow *public* employers to substitute "compensatory time"—paid time off—for the cash payments otherwise required by the Act for overtime worked. Most pertinently, Section 207(o)(2)(A)(i) states that compensatory time may be provided pursuant to "applicable provisions of a collective bargaining agreement, memorandum of understanding or any other agreement between the public agency and representatives of such employees; . . . ."

The regulations adopted by the Secretary of Labor to implement FLSA Section 207(o) provide, in turn, that "the representative need not be a formal or recognized

bargaining agent as long as the representative is designated by the employees." Pet. App. 31a. The regulations add ". . . *Where employees have a representative,* the agreement or understanding concerning the use of compensatory time *must* be between the representative and the public agency." Pet. App. 31a (emphasis added).

2. The Harris County Deputy Sheriffs, who are petitioners here, are employed by the Harris County Sheriff Department and the Sheriff of Harris County, Johnny Klevenhagen. Petitioners have designated the Harris County Deputy Sheriffs Union, Local 154 and/or Eugene T Merritt, Jr. or Lynwood Moreau[1] as their representatives for the purposes of reaching an FLSA Section 207(o) compensatory time agreement with their public employer. Local 154 has represented deputy sheriffs for more than five years in grievance proceedings concerning working conditions. Local 154 has also reached an agreement with the County which provides for the deduction of union dues through the County payroll.

Harris County, however, has refused to enter into any discussion of agreement with Local 154 concerning overtime compensation. The Harris County Sheriff's Department instead has unilaterally instituted and maintained an overtime policy which provides for compensatory time in lieu of cash payments. Under this unilaterally imposed system, deputy sheriffs receive up to 240 hours of compensatory time for their work.

3. Petitioners instituted this suit in the United States District Court for Southern District of Texas on April 15, 1988, after the County—despite protests by petitioners—made clear that it would adhere to its position of refusing to discuss compensatory time arrangements with the Local 154. Petitioners' Complaint challenged the legality of the County's requirement that deputy sheriff's

[1] On April 15, 1988, when the suit was originally brought Eugene T. Merritt, Jr. was president of the union. At the time of the appeal, Lynwood Moreau serves as president of the Union.

accept compensatory time off in lieu of overtime pay despite their designation of a representative and despite the absence of any agreement with that representative.

The court below upheld the Harris County program on the grounds that state law does not authorize Harris County to enter into a bilateral agreement with the employees' representatives, and therefore, no Section 207(o) agreement was required. Pet. App. 7a.

REASONS FOR GRANTING THE PETITION

A SEVERE CONFLICT EXISTS AMONG THE COURTS OF APPEALS AS TO THE APPLICATION OF SECTION 207(o) OF THE FAIR LABOR STANDARDS ACT.

I. POST-*GARCIA* LEGISLATIVE BACKGROUND.

As originally enacted in 1938, the Fair Labor Standards Act ("FLSA") applied only to private employers. Beginning in 1966, Congress expanded the coverage of the FLSA to protect state and local government employees as well. Congress' assertion of a Commerce Clause power to set basic labor standards—such as those set out in the Fair Labor Standards Act, as amended—in the state and local government sector as well as in the private sector has raised a contentious federalism dispute. *See, e.g., Maryland v. Wirtz*, 392 U.S. 183 (1968); *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 328 (1985). At least in part this dispute has stemmed from the concern that Congress could not—or would not—recognize and give adequate consideration to the special attributes of the state and local governments and the special character of the public employer-public employee relationship.

In a direct response to these concerns, the 1985 Congress amended the Fair Labor Standards Act insofar as that Act applies to the public sector. P.L. 99-150; 99

Stat. 790. And Congress acted only after full consultation with both public employers and public employees in a process designed to ascertain and harmonize their basic interests and needs. Indeed, Congress went so far as to mandate the issuance of regulations necessary to implement the 1985 FLSA amendments. P.L. 99-150, § 6. The Department of Labor, in turn, conducted an extensive rulemaking proceeding and solicited and carefully considered the views of the state and local governments and of public employees. *See* 52 Fed. Reg. 2012-15 (1987).

After the *Garcia* decision, many public employers and their organizations sought congressional relief from the costs of FLSA coverage, arguing that such costs would seriously injure their ability to function effectively. In hearings held by House and Senate committees, public employees and their representatives made the contrary arguments that compliance with *Garcia* would not be excessively costly and that it was only fair for public employees to enjoy the same labor standards as virtually all private employees.

At the invitation of Congressional leaders, the public-employer and pubic-employee groups met and proposed a bill which was the product of intense negotiations between all the affected parties and of extensive compromise. *See, e.g.*, 131 Cong. Rec. S14047 (Sen. Nickles) (the final Senate bill "is different from the bill I originally introduced and represents a compromise among the affected parties"); 131 Cong. Rec. H9916 (Rep. Hawkins) ("bipartisan efforts" and "compromise" produced the 1985 FLSA amendments). The compromise bill was supported by "the U.S. Conference of Mayors, the National League of Cities, the National Conference of State Legislators, the AFL-CIO, [the International Union of Police Associations], and the Fraternal Order of Police," 113 Cong. Rec. S14047 (Sen. Nickles); *accord* 131 Cong. Rec. H9238 (Rep. Hawkins). And, with such broad support, the 1985 FLSA Amendments were quickly passed by Congress.

The relevant provisions of Section 207(o) of the statute provide that a public employer may provide compensatory time "*only* pursuant to"

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work. [29 U.S.C. Section 207(o)(2)(A).]

Section 207(o) further specifies that

> In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). [29 U.S.C. Section 207(o).]

These are the only circumstances under which a public employer is permitted to deviate from the basic rule that employers are required to pay their employees in cash for all overtime worked.

Through promulgating the regulations, the Department of Labor determined that an agreement or understanding reached prior to the performance of work is a prerequisite to granting compensatory time in lieu of overtime payment in cash. The regulations emphasize

> Where employees have a representative, the agreement of understanding concerning the use of compensatory time must be between the representative and the public agency . . . . In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. [29 C.F.R. Section 553.23(b)(1).]

Section 207(o) read together with these regulations seemed clear. Nonetheless, a deep disagreement has developed as to a critical aspect of the compromise forged in the 1985 FLSA amendments and elaborated in the regulations on those amendments: the scope of the provision requiring public employers who desire to provide compensatory time in lieu of overtime pay to reach an agreement on compensatory time with the representative designated by their employees. This disagreement concerns the interplay between the federal law setting the conditions for the provision of compensatory time and the state law setting the conditions on which public employers may enter into agreements with their employees.

The resulting litigation has led to a clear and patent conflict in the circuits with the result that the rights of public employees and duties of public employers with respect to overtime compensation now vary widely depending on the circuit in which the employment occurs. As stated by Chief Judge Ervin of the Fourth Circuit, it is unlikely "that Congress intended for the protections afforded by the [FLSA] to hinge upon the accident of the state in which the employee happens to reside." *Wilson v. City of Charlotte*, Slip Op. No. 89-2388 (4th Cir. May 8, 1992) (Ervin, C.J., dissenting). It is imperative that this Court resolve the conflict of the circuits.

II. THE CONFLICT IN THE CIRCUITS.

A. The Tenth Circuit: *West Adams.*

The first court of appeals to interpret FLSA Section 207(o) was the Tenth Circuit in *Local 2203 v. West Adams County Fire District*, 877 F.2d 814 (10th Cir. 1989). The West Adams Fire Department—a local government employer in Colorado—refused to enter into an FLSA Section 207(o)(2)(A)(i) compensatory time agreement with the employee designated representative. The Fire District averred that it was precluded from entering into such an agreement since Colorado—like Texas

here—allows each political subdivision to determine whether or not it will recognize employees' representatives for collective bargaining and it had chosen not to enter into any agreements with employee groups or representatives.[2] The Fire District further argued that since state law precluded it from entering into an agreement with the representative under Section 207(o)(2)(A)(i), that it was therefore free under Section 207(o)(2)(A)(ii) to follow its past practices regarding compensatory time regardless of its employees efforts to designate a representative.

The Tenth Circuit rejected this argument concluding that under the FLSA, once employees designate a representative for purposes of reaching a Section 207(o)(2)(A)(i) agreement, a public employer may only provide compensatory time in lieu of overtime pay pursuant to some form of agreement with that representative. Section 207(o)(2)(A)(ii)'s permission to provide compensatory time pursuant to individual agreements or past practices, said the Tenth Circuit, applies *only* where the employees in question have *not* designated a representative. The Tenth Circuit further recognized that a public employer is under no obligation to reach an agreement or understanding or even engage in any discussions with its employees' representative; but, said that court, the consequences of the employer's refusal is that the employer must, like all other employers, pay cash overtime for required overtime work. 877 F.2d at 820, n.7.

The Tenth Circuit principally relied on the Department of Labor's regulations which, as previously indicated, assert that the public employer must come to an

[2] Under Colorado law, governmental entities have a right to refuse to recognize labor organizations and to refuse to engage in collective bargaining or enter into any agreements whatsoever with such organizations. *See City and County of Denver v. Denver Fire Fighters*, 663 P.2d 1032, 1036-1039 (Colo. 1983); *Littleton Education Assn. v. Arapaho County School District No. 6*, 191 Colo. 411, 553 P.2d 793 (1976).

agreement with a designated representative even if the representative was not formally recognized. The Tenth Circuit concluded that the regulation makes two irrefutable points:

> First, if employees have a representative, an employer may use compensatory time only pursuant to an agreement between the employer and the representative. Second, employees are deemd to be represented under Section 207(o) if they merely designate a representative; the representative need not be recognized by the employer. [877 F.2d at 818.]

Noting this Court's mandate in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the court recognized that "the Department's construction of the Section, if reasonable, is controlling even if there is an equally reasonable construction." 877 F.2d at 817. The court looked first to determine if the statutory language was ambiguous and second if the administrative construction was a reasonable resolution of the ambiguity.

As to the ambiguity of the statutory language, the Tenth Circuit stated

> We find the language of Section 207(o) to be ambiguous. Subclause (ii) applies to "employees not covered by subclause (i)." However, given the wording of subclause (i), it is unclear whether this means employees who do not have a representative, or employees who are not subject to an agreement reached with a representative. [877 F.2d at 816-17.]

Since the Tenth Circuit found the language to be ambiguous, it next turned to the administrative interpretation to determine whether it is reasonable. The Tenth Circuit noted that all relevant legislative history materials support the Labor Department's view that Section 207(o)(2)(A)(ii) only applies where the employees have

no representative. *See* 877 F.2d at 819 (quoting S. Rep. No. 99-159, 99th Cong., 1st Sess. 10-11 (1985) and H.R. Rep. No. 99-331, 99th Cong., 1st Sess. 20 (1985)). The Tenth Circuit further found that the Labor Department's view that employees are represented when they have simply designated a representative is a reasonable construction of the legislation because it is fully supported by the House Report.

B. The Fourth Circuit: *Abbott*.

The Fourth Circuit has rendered two opinions on this issue. The first Fourth Circuit opinion on the scope of Section 207(o)(2)(A) is *Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 854 (1990). *Abbott* cannot be reconciled with *West Adams*. The only similarity between the Fourth Circuit's interpretation and that of the Tenth Circuit is the acceptance of the proposition that when employees have a representative, a public employer may only provide compensatory time pursuant to an agreement with the employees' representative.

The Fourth Circuit focused on two factors in construing Section 207(o), neither of which is adverted to in the statute or in the Labor Department's regulations. First, the Fourth Circuit placed a great deal of emphasis on Virginia's state law which prohibits agreements with public employee collective bargaining representatives. Second, the Fourth Circuit was persuaded by the public employer's policy of allowing each individual employee who worked overtime an *absolute choice* between overtime pay and compensatory time.

In emphasizing the state law, the Fourth Circuit relied on the preamble of the Labor Department's regulations.

> It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section [207(o)] shall be determined in accordance with State or local law and practices.[3]

On the basis of the foregoing, the Fourth Circuit concluded that Section 207(o)(2)(A)(i) does not apply where state law prohibits agreements with employee representatives, since otherwise the statute would "preempt," rather than incorporate, state law. The Fourth Circuit distinguished the Tenth Circuit's *West Adams* decision on the ground that Virginia law prohibits agreements with public employee collective bargaining representatives while Colorado law allows local governments to choose whether to engage in collective bargaining or not. The Fourth Circuit did not explain, however, why a state decision to prohibit collective bargaining should operate to alter the scope of Section 207(o)(2)(A)(i) while a state decision to delegate that decision to a local government, which in turn determines to deny its employees collective bargaining rights, should not.

Regarding the fact that Virginia Beach offered individual employees a choice of overtime pay or compensatory time, the Fourth Circuit stated that respondent had conformed to the underlying policies of FLSA Section 207(o) which "provides flexibility to state and local government employers and an element of a choice to their employees regarding compensation for statutory over time hours worked by covered employees." 879 F.2d at 136-37 (quoting H.R. Rep. No. 99-331, *supra*). However, that court did not explain how this factor fits into Section 207(o)'s language or structure.[4]

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[3] The Fourth Circuit did not cite or discuss other portions of the preamble or of the regulations which belie that court's reading of the regulations.

[4] Significantly, neither of the factors relied on in *Abbott* are present in the instant case. Texas does not absolutely prohibit local governments from collective bargaining. *See* the Texas Fire and Police Employee Relation Act, Tex. Rev. Civ. Stat. Ann., Art. 5154c-1 (Vernon 1987). Second, unlike in Virginia, Harris County

C. The Eleventh Circuit: *Dillard*.

The Eleventh Circuit in *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 210 (1990) reached yet another interpretation of the statute. The Eleventh Circuit, recognizing dissention among the circuits, claimed that it refused to follow the Tenth Circuit and that it preferred the Fourth Circuit's *Abbott* interpretation. However, the Eleventh Circuit then declined to follow the *Abbott* rationale completely and instead offered an alternative construction. The only interpretation the *Dillard* and the *Abbott* courts agreed upon was that if state law prohibits collective bargaining, the public employer is precluded from entering into any type of agreement or understanding with the employees' representatives.

The differences between the Eleventh Circuit opinion and Fourth Circuit's *Abbott* opinion emphasize the stark conflict between the circuits. Unlike the *Abbott* court which found the presence of flexibility and absolute employee choice in the employer's policy dispositive, the *Dillard* court averred that the FLSA gave states the "upper hand" in deciding how to compensate for overtime work. Thus, Georgia's unilateral mandate of no overtime cash was approved by *Dillard* even when it would have violated the *Abbott* "absolute choice of cash" rule.

The Eleventh Circuit also took the position that according to the "plain language" of the statute, Section 207(o)(2)(A)(i) applies only where an agreement al-

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Deputy Sheriffs are not guaranteed an absolute right to choose cash over compensation time for their overtime work. Compensation time is a condition of employment in Harris County. Illustrative of the disarray in the circuits is the fact that had the rationale applied in *Abbott* been applied to the facts at hand, the outcome in this case would be very different. Nevertheless, the Fifth Circuit reached the same final conclusion (public employers can impose compensation time in lieu of cash payments without agreeing with the employees representatives).

lowing for compensatory time has already been reached between an employer and a representative. In other words, the applicability of subclause (i) depends, not on whether there is a representative as the other circuits contend, but on whether there is an agreement. The court concluded that whenever there is no agreement, whether the employees have designated a representative or not, the employer is free to implement compensatory time programs under Section 207(o)(2)(A)(ii).

This position is, of course, in direct conflict with *West Adams* and *Abbott*. Each of those decisions accepted that where employees have a representative, the employer must reach an agreement with that representative or pay money for overtime; the only point of disagreement among those circuits was determining when employees can be said to have a representative. *Dillard* also conflicts with the Legislative History and the Administrative interpretation. *See* 29 C.F.R. 553.23(b)(1); S. Rep. No. 99-159, *supra*, at 10-22, H.R. Rep. No. 99-331, *supra*, at 20. Finally, the Eleventh Circuit also asserted that the language of the statute is clear. Nevertheless, the Tenth Circuit painstakingly set out how the statute is ambiguous. Thus the *Dillard* decision delineated yet a third construction of Section 207(o) of the FLSA.

D. The Ninth Circuit: *Nevada Highway Patrol*.

The Ninth Circuit has taken still another view of the scope of Section 207(o)(2)(A). *Nevada Highway Patrol Association v. Nevada*, 899 F.2d 1549 (9th Cir. 1990). Like the Tenth and Fourth Circuits, the Ninth Circuit accepts that once employees have a representative, Section 207(o)(2)(A)(i) permits compensatory time *only* through an agreement or understanding between the employer and the representative. The Ninth Circuit, like the Fourth Circuit, deviated from the Tenth in holding that state law plays a role in determining whether the employees have a designated representative. However, the

Ninth Circuit recognized that even when state law precludes collective bargaining, the state may allow representation, informal agreements and understandings which would satisfy Section 207(o)(2)(A)(i).

On this basis, and on the basis that the state had recognized one labor organization as the employee's representatives for the purpose of "representing its members for discussion of conditions of employment," the court concluded that the labor organization is an informal representative within the meaning of Section 207(o)(2)(A)(i). The court determined that compensatory time could not be provided absent an agreement with that labor organization.[5]

E. The Fifth Circuit: *Moreau*.

The Fifth Circuit decision in the instant case also cannot be reconciled with the other circuits' decisions. As indicated earlier, political subdivisions in Texas, like those in Colorado, may opt to enter into collective bargaining agreements with a labor organization by adopting the Fire and Police Employee Relations Act ("FPERA"). Harris County has not adopted this Act. As a result, the Fifth Circuit determined that "Texas law [would] prohibit[] any bilateral agreement between [the county] and a bargaining agent whether the agreement is labeled a collective bargaining agreement or something else." Pet. App. 7a.

The Fifth Circuit claimed that it joined the Fourth and Eleventh Circuits in holding that when state law pre-

[5] The facts in Nevada are nearly identical to the present situation in Texas. Here, Local 154 is recognized generally as the representative of its members with regard to their work place concerns by the Harris County Sheriff, and under Texas law (Tex. Rev. Civ. Stat. Ann. Art. 5154c Section 6). Consequently, under the Ninth Circuit ruling, Harris County should have been obligated to reach an agreement with Plaintiffs before providing compensatory time. The Fifth Circuit's contrary conclusion, as will be explained below, embodies the dissension among the circuits.

cludes a public employer from entering into an agreement, subclause (i) is inapplicable. However, as previously noted, the Fourth Circuit did not reach such a conclusion. In fact, the Fourth Circuit asserted that the distinguishing factor between *Abbott* and *West Adams* was that Virginia, unlike Colorado (and Texas), does not give its political subdivisions any choice in determining whether to bargain or not. The Fourth Circuit suggested that if the public employer has an option to enter into collective bargaining then subclause (i) would apply regardless of whether the option was selected.

Furthermore, the decision below is in direct conflict with all of the other circuits. The Tenth, Ninth, and Fourth Circuits all accepted that if the employees had a representative, subclause (i) requires the employer to reach an agreement with that representative or pay money for overtime worked.[6] The Eleventh Circuit stressed that despite a state's no collective bargaining law, subclause (i) would apply if an agreement between the employer and the representative already existed because the determinative factor is the existence of an agreement not the existence of a representative. On the other hand, the Fifth Circuit insisted that under no conditions may a political subdivision which has not adopted the FPERA enter into an agreement with the employees' representative. The Fifth Circuit also varies from the Fourth because the Harris County Deputy Sheriffs do not enjoy the absolute right to cash which the Fourth Circuit's *Abbott* would require.

F. The Fourth Circuit: *Wilson*.

The dissention in the circuits continues even beyond this case. A few months after *Moreau* was decided, the Fourth Circuit rendered its second opinion on this issue.

[6] As explained above, the circuits disagree when it comes to determining whether the employees have a representative for purposes of Section 207(o)(2)(A)(i).

Wilson v. City of Charlotte, Slip Op. No. 89-2388 (4th Cir. May 8, 1992). Demonstrative of the complete confusion among the circuits, *Wilson* conflicts not only with the other circuits but with the Fourth Circuit's own precedent in *Abbott*. Moreover, in *Wilson*, which was rendered by the full court, *en banc*, the court itself could not reach a majority interpretation.

In a six to one to five opinion, the Fourth Circuit appeared to disagree with its previous holding in *Abbott* and agree with *Dillard* that the dispositive issue in determining if subclause (i) applies is the existence of an agreement and not the existence of a designated representative. In *Wilson*, the plaintiffs were all hired before April 15, 1986. The employees had designated a representative prior to that date. Nevertheless, the city unilaterally imposed a compensatory time policy instead of a cash payment policy for overtime worked. The court found that the city was not in violation of the FLSA because the compensatory time policy existed before April 15, 1986, and therefore, according to the statute, it constituted an agreement.

Six members of the court found that the city did not have to negotiate with the employees' representative concerning its compensation time policy because the state does not allow for such agreements. As a result of this state law, the plurality argued, the employees could not have a representative within the meaning of subclause (i). In a footnote, these six judges declined to decide the meaning of the regulation had the employees had a representative.

The concurrence by Judge Luttig, on the other hand, averred that the plurality offered no support for its definition of a representative. Judge Luttig, agreeing with the five dissenters, explained that the regulation expressly stated that the representative can be informal. He added that "North Carolina's prohibition against collective bargaining by public agencies . . . has no bearing whatsoever

on whether the local is a 'representative' within the meaning of the regulation." Slip Op. No. 89-2388 at 13; Pet. App. 172a (Luttig, J., concurring).

However, the Judge then adopted a new interpretation of the statute. He averred that the public employer is in compliance provided it reaches an agreement with either the individual employee or the representative. In addition, Judge Luttig contended, the existence of a representative does not dictate with whom the employer must agree.

Five judges dissented in an opinion written by Chief Judge Ervin. The dissenters, like the majority, did not adopt the circuit's precedent in *Abbott*. Agreeing largely with the Tenth Circuit's *West Adams* opinion, Chief Judge Ervin asserted that the majority in *Wilson* created the

> inequitable result of resting the rights of public employees under the federal law that purports to protect them, the Fair Labor Standards Act . . . , on the idiosyncracies of state legislatures. . . . I do not think that Congress intended for the protections afforded by the Act to hinge upon the accident of the state in which the employee happens to reside. I also do not think that Congress intended to allow a public employer to force an individual employee to accept compensatory time instead of cash for overtime worked as a condition of taking the job when the employees have designated a representative to negotiate jointly for them. [Slip Op. No. 89-2388 at 18; Pet. App. 178a. (Ervin, C.J., dissenting).]

The dissent noted that contrary to the assertions of the Eleventh Circuit, the language of the statute is ambiguous. It explained that subclause (ii) which refers to "employees not covered by subclause (i)" could refer to those employees who lack an agreement or those who lack a representative. Both interpretations have been adopted by various circuits which further illustrates the ambiguity. Relying on this Court's opinion in *Chevron, supra*,

the dissent explained that to resolve the ambiguity, the courts are bound to accept the Department of Labor's interpretation, provided it is reasonable. Chief Judge Ervin found that the regulation was clearly supported by the legislative history, and therefore, must be reasonable. According to Chief Judge Ervin, the regulation enunciates two important meanings: first, if the employees select a representative, the employer must reach an agreement with the representative in order to grant compensatory time[7]; and second, employees are represented once they designate a representative regardless of whether the employer recognizes the representative or not.

Chief Judge Ervin specified that the statute applies even when the state prohibits collective bargaining. "The fact that Congress included the possibility of an agreement being in some other form indicates that this agreement could be reached in states like North Carolina that do not allow public collective bargaining." Slip. Op. No. 89-2388 at 22; Pet. App. 182a (Ervin, C.J., dissenting). He concluded that

> the practical result of the majority's decision is that the City can refuse to bargain with the employees' representative with the excuse that state law requires this result, thus unilaterally eviscerating the employees' choice in the matter and effectively circumventing the requirements of the Fair Labor Standards Act. According to the majority, employees who reside in states that prohibit public agencies from engaging in collective bargaining have fewer rights under federal law than their counterparts who live in states with no such prohibition. I do not believe that Congress intended for employees' rights under the [FLSA] to hinge upon the mere fortuity of geography. Slip Op. No. 89-2388 at 23; Pet. App. 184a (Ervin, C.J., dissenting).]

[7] However, the dissent clarified, employers can still choose not to enter into any agreements with anyone. If public employers choose this option they must pay their employees in cash for overtime worked.

As the foregoing demonstrates, the decisions of the Tenth, Ninth, Fourth, Eleventh and Fifth Circuits on the meaning of Section 207(o) leave the law in total disarray. Review by this Court is urgently required.

III. THE DECISION BELOW.

Review by this Court is further necessary because of the erroneous interpretation of this important question of federal law. The Fifth Circuit's decision below is not only in conflict with every other circuit which has decided this issue, as we will now show, it is also incorrect. Apparently ignoring the Department of Labor's regulations, the Fifth Circuit reached a decision which contradicts the reasonable interpretation adopted by the Labor Department regulations.

According to the court below, Section 207(o)(2)(A)(i) only applies where state law allows public employers to enter into collective bargaining with its employees. In Texas, a local Fire or Police Department is forbidden from engaging in collective bargaining unless the political subjurisdiction has adopted the FPERA. The court below determined that because Harris County had not adopted the FPERA, it could not enter into *any* type of agreement with an employee representative. The court dismissed the fact that Texas does recognize informal employee representative for the purposes of presenting employment grievances. Moreover, the Fifth Circuit contended, in light of Harris County's inability, under state law, to enter into an agreement with the deputies' representative, Harris County was free to implement any compensatory policy which had existed prior to April 15, 1986 or to which individual employees had agreed.

However, the statutory language itself asserts that the provision is satisfied through a "memorandum of understanding or any other agreement." Section 207(o) also begins by declaring that compensation time can *only* be provided if there is an agreement with the representative

or, if there is no representative, an agreement with the individual employee. Furthermore, the Department of Labor has promulgated regulations which provide that "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." The Fifth Circuit wholly ignored both the statutory and regulatory language. Given the statutory language and the Labor Department's regulations, the Fifth Circuit's insistence that Section 207(o)(2)(A)(i) has no application where the state does not permit collective bargaining is simply incorrect.

CONCLUSION

For the above stated reasons, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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